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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWIN CELIS,

Defendant and Appellant.

B256031

(Los Angeles County
Super. Ct. No. BA397039)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed as modified and remanded with directions.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

After a jury found appellant Edwin Celis guilty on two counts of attempted murder (Pen. Code, §§ 187, subd. (a), 664)), the trial court orally imposed a cumulative sentence of 55 years to life plus 20 years in state prison.¹ Appellant contends the minute order from the sentencing hearing and the abstract of judgment contain errors regarding his sentence. We modify the judgment to cure a defect in the trial court's pronouncement of appellant's sentence, affirm the judgment as modified, and direct the correction of the sentencing minute order and the abstract of judgment.

RELEVANT PROCEDURAL HISTORY

On August 28, 2012, an information was filed, charging appellant and Efrain Ramirez in counts 1 and 2 with the attempted willful, deliberate, and premeditated murder of two different individuals.² Each count alleged that the crime was gang-related (§ 186.22, subd. (b)(1)(C)) and that a principal personally discharged a handgun causing great bodily injury (§ 12022.53, subds. (b), (c), (d), (e)(1)). Appellant pleaded not guilty and denied the special allegations.

A jury found appellant guilty as charged, and found the special allegations to be true. The trial court sentenced appellant to 55 years to life plus 20 years in prison. This appeal followed.

¹ All statutory citations are to the Penal Code.

² Ramirez is not a party to this appeal.

DISCUSSION³

Appellant contends the sentencing minute order and the abstract of judgment contain mischaracterizations or errors regarding his sentence. As explained below, we agree.⁴

A. Punishment Related to Gang Findings

Appellant contends that under each count of attempted murder, the sentencing minute order and the abstract of judgment improperly reflect the imposition of a term of 15 years to life based on the gang finding under section 186.22, subdivision (b)(1). As explained below, although the reporter's transcript of the sentencing hearing establishes the trial court's intent to impose a lawful sentence in connection with the gang findings, the court's characterization of that aspect of appellant's sentence was defective. We will therefore modify the court's pronouncement of sentence to cure the defect, and direct the amendment of the sentencing minute order and abstract of judgment.

³ As appellant's sole contention concerns whether the sentencing minute order and the abstract of judgment contain errors, we omit a summary of the evidence presented at trial. (*People v. White* (1997) 55 Cal.App.4th 914, 916, fn. 2; *People v. McNeely* (1994) 28 Cal.App.4th 739, 742.)

⁴ Generally, "[i]n a criminal case, it is the *oral pronouncement of sentence* that constitutes the judgment. [Citation.] To the extent a minute order diverges from the sentencing proceedings it purports to memorialize, it is presumed to be the product of clerical error. [Citation.] Likewise, the abstract of judgment "cannot add to or modify the judgment which it purports to digest or summarize." [Citations.] As with other clerical errors, discrepancies between an abstract and the actual judgment as orally pronounced are subject to correction at any time, and should be corrected by a reviewing court when detected on appeal. [Citation.]" (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324.)

Appellant's contention concerns the aspect of the sentence that the trial court imposed under subdivision (b)(5) of section 186.22 (subdivision (b)(5)), which is an element of the complex statute governing sentencing for gang-related crimes (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004-1011). The jury found that appellant had engaged in gang-related crimes, as specified in subdivision (b)(1) of section 186.22. Under subdivision (b)(5), anyone who engages in such conduct "in the commission of a felony punishable by imprisonment in the state prison for life[], shall not be paroled until a minimum of 15 calendar years have been served." (*Lopez, supra*, 34 Cal.4th at p. 1006.) Subdivision (b)(5) applies to all life terms (*Lopez, supra*, at pp. 1007-1011), including one imposed for attempted willful, deliberate, and premeditated murder, which is subject to punishment by imprisonment for life with the possibility of parole (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1228; § 664, subd. (a)).

Subdivision (b)(5) is an "alternate penalty provision" that does not establish an enhancement. (*People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7; *People v. Jefferson* (1999) 21 Cal.4th 86, 101.) For purposes of sentencing, an enhancement is defined as "an additional term of imprisonment added to a base term." (*Jefferson, supra*, 21 Cal.4th at p. 101, quoting former Cal.Rules of Court, rule 405(c), now 4.405(3).) Rather than imposing such a term, subdivision (b)(5) is intended to provide "an alternate increased sentence in the form of a higher minimum eligible parole date" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 899-900.)

At the sentencing hearing, the trial court orally imposed a cumulative sentence of 55 years to life plus 20 years. In sentencing appellant on count 1, the court imposed life with the possibility of parole on the offense of attempted willful, deliberate, and premeditated murder. The court further stated that pursuant to section 186.22, subdivision (b)(5), "an additional term of 15 years to life is added

to the term previously imposed,” as well as a gun use enhancement of 25 years to life under section 12022.53, subdivision (d), which the court also characterized as “an additional term . . . added to the term previously imposed.” The court’s sentencing regarding count 2 followed a similar pattern. After imposing life with the possibility of parole on the underlying offense, the court stated that pursuant to section 186.22, subdivision (b)(5), “the additional term of 15 years to life is added to the term previously imposed,” plus a 20-year gun use enhancement under section 12022.53, subdivision (c).⁵

Upon directing that the sentences on the counts run consecutively, the court stated, “The total term of imprisonment for [appellant] is 55 years to life, plus 20 years determinate; [the] 20 years to be served first. I think I’ve explained how it’s calculated: [on count 1,] life, *plus 15 years to life*, plus 25 years to life; [on] count 2, life *plus 15 years to life*, plus 20 years determinate, totaling 5[5] years to life, plus [2]0 years determinate; determinate term to be served first.”⁶ (Italics added.)

The court’s descriptions of the penalty imposed under subdivision (b)(5) as an “additional term . . . added to the term previously imposed” and as “15 years to life” were defective, regardless of whether they signaled that the court, in fact, misapprehended that penalty. As respondent concedes, those descriptions incorrectly suggest that the penalty amounted to an enhancement of 15 years to life

⁵ In sentencing appellant on counts 1 and 2, the court also imposed and stayed several enhancements.

⁶ We note that, according to the reporter’s transcript, the trial court misspoke in offering the explanation quoted above, as it ended the final sentence with the phrase, “totaling 50 years to life, plus 10 years determinate; determinate term to be served first.” However, the court’s oral pronouncements clearly establish its intent to impose an cumulative sentence of “55 years to life, plus 20 years determinate”

added to the underlying life term. Indeed, the sentencing minute order and abstract of judgment reflect such errors. The former states that “an additional . . . 15 years to life” was imposed on each count; furthermore, the latter states that an “enhancement” of “15 Life” was imposed on each count, and omits any reference to the imposition of 15-year minimum parole eligibility periods under subdivision (b)(5).⁷

Because the trial court’s clear intent was to impose a lawful sentence under subdivision (b)(5), it is unnecessary for us to remand the matter for resentencing. An unauthorized sentence -- that is, one that cannot be imposed under any circumstances -- may be corrected at any time, including on appeal. (*People v. Price* (2004) 120 Cal.App.4th 224, 242-245.) Because subdivision (b)(5) mandated the imposition of 15-year minimum parole eligibility periods on appellant’s life terms for attempted murder under the circumstances present here, no other penalty or punishment could be imposed. (See *People v. Campos* (2011) 196 Cal.App.4th 438, 447-448 [when subdivision (b)(5) governed sentencing, imposition of a different parole eligibility period resulted in unauthorized sentence].) We therefore will modify the judgment to reflect the imposition of that penalty, and direct the amendment of the sentencing minute order and abstract of judgment to cure the defects described above.⁸

⁷ Respondent suggests that the court erred in characterizing the gun use enhancement on count 1, arguing that subdivision (d) of section 12022.53 sets forth a “determinate” 25-year enhancement. However, that provision establishes a 25-years-to-life enhancement. Appellant also misapprehends an aspect of the trial court’s sentencing. He suggests that the court “appeared to correct itself” regarding his sentence in a later portion of the sentencing hearing, but cites the court’s oral pronouncement of co-defendant Ramirez’s sentence. (Italics deleted.)

⁸ Respondent argues that the matter should be remanded to permit the trial court to clarify its intent. This argument appears to be predicated -- at least in part -- on (Fn. continued on next page.)

B. *Restitution*

Appellant contends the sentencing minute order and the abstract of judgment fail to reflect the trial court's full ruling regarding restitution. At the sentencing hearing, the court imposed a "joint and several" obligation on appellant and co-defendant Ramirez to pay \$594 in restitution. Although the sentencing minute order and the abstract of judgment state that appellant is obliged to pay \$594 in restitution, they omit the ruling that the obligation is joint and several. Respondent does not dispute the existence of that error. Accordingly, the sentencing minute order and the abstract of judgment must be amended to correct the omission.

respondent's mistaken view that section 12022.53, subdivision (d), sets forth a "determinate" 25-year enhancement. (See fn. 7, *ante*.) As observed above, the trial court ruled that the "determinate" 20-year gun use enhancement on count 2 would be served first. After noting that ruling, respondent argues that the trial court's actual intent was to impose a cumulative sentence of "75 years to life, with the 45 years of determinate sentencing running first." However, as the court properly imposed a 25-years-to-life enhancement under section 12022.53, subdivision (d) on count 1, the only defects in the pronouncement of sentence relate to the penalties under subdivision (b)(5) of section 186.22. For the reasons discussed above, no remand is necessary to cure those defects.

DISPOSITION

The judgment is modified to strike the term of 15 years to life imposed on counts 1 and 2, and to reflect the imposition on each count of a 15-year minimum parole eligibility period (§ 186.22, subd. (b)(5)). So modified, the judgment is affirmed. The trial court is directed to correct the sentencing minute order to reflect the modification stated above, and to state that appellant's obligation to pay \$594 in restitution is joint and several with co-defendant Ramirez. The trial court is further directed to prepare an amended abstract of judgment reflecting the corrections stated above, and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.